

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

Illinois Commerce Commission)	
on its own motion)	
)	Docket No. 01-0705
Northern Illinois Gas Company d/b/a NICOR)	
Gas Company)	
)	
Reconciliation of Revenues collected under)	
Gas Adjustment Charges with Actual Costs)	
prudently incurred)	
)	
Illinois Commerce Commission)	
on its own motion)	
)	
)	Docket No. 02-0067
Northern Illinois Gas Company d/b/a NICOR)	
Gas Company)	
)	
Proceeding to review Rider 4, Gas Cost, pursuant)	
to Section 9-244(c) of the Public Utilities Act)	
)	
Illinois Commerce Commission)	
on its own motion)	
)	
)	Docket No. 02-0725
Northern Illinois Gas Company d/b/a NICOR)	
Gas Company)	
)	
Reconciliation of Revenues collected under)	
Gas Adjustment Charges with Actual Costs)	
prudently incurred)	

**THE CITIZENS UTILITY BOARD AND
COOK COUNTY STATE'S ATTORNEY'S OFFICE
MOTION TO COMPEL NICOR TO RESPOND
TO CUB'S 11TH SET OF DATA REQUESTS**

The Citizens Utility Board (CUB) and the Cook County State's Attorney's Office (CCSAO) hereby renew their Motion to Compel Nicor to Respond to CUB's 11th Set of Data Requests filed on December 4, 2002. A copy of the 11th Set of Data Requests is attached to this Motion as Exhibit A. The set relates to the Report to the Special

Committee of the Board of Directors of Nicor, Inc. CUB and CCSAO also request that Nicor be ordered to provide unredacted copies of interview summaries used in compiling the Lassar report.

I. Background.

The Data Requests at issue in this Motion involve questions relating to the Report to the Special Committee of the Board of Directors of Nicor, Inc. This report has been referred to as the Lassar Report. It is a factual investigation of the underlying issues of these dockets brought about after the whistleblower facsimile caused these dockets to be reopened. The author of the Lassar Report is Scott Lassar, an attorney, with the law firm of Sidley Austin Brown & Wood. The Report states that the firm “was hired by a Special Committee of the Board of Directors of Nicor Inc.” to conduct the factual investigation.

At various hearings, Nicor has stated that it has no control over the conduct of the investigation nor over the materials created during the investigation. Nicor has argued that the “client” of the Lassar Report is the Special Committee of the Board of Nicor, Inc. July 23, 2002 Transcript at 123-124. Thus, not only does Nicor Gas argue that it is not the client of Mr. Lassar, May 12, 2003 Transcript at 187 but also that Nicor, Inc. is not Lassar’s client.

CUB and CCSAO originally filed a Motion to Compel Nicor to answer the 11th Set on February 3, 2003. For convenience, a copy of the Motion is attached as Exhibit B. The arguments in the original Motion to Compel will not be restated in this Motion but are incorporated by reference.

The Motion was scheduled to be heard by the Administrative Law Judges at an open session on February 6, 2003. At the open meeting, Nicor agreed to provide all

materials requested subject to a protective order. See Transcript at 51. The motion was continued until the parties had an opportunity to review the material provided. See Transcript at 52.

Nicor did furnish materials from Sidley & Austin and KPMG but did not formally answer any of CUB's Data Requests in Set 11. CUB and CCSAO were led to believe that what was being provided was all materials from Sidley & Austin and KPMG used in compiling the Lassar report. Not only did the materials furnished contain numerous redactions without explanation but also during the recent deposition of Len Gilmore it was revealed that Nicor did not in fact turn over all the materials, including witness summaries, from Sidley & Austin and KPMG, requiring that the deposition be stopped and rescheduled. Again, during the deposition of Ted Lenart it was revealed that Mr. Lenart took personal notes of the meeting with Mr. Lassar's team that were not turned over during discovery. Nicor to this day has not affirmatively stated that it has turned over all Lassar report documents and based upon Nicor's response to answer the 11th Set of Data Requests, CUB and CCSAO believe Nicor still is withholding documents but because Nicor has not provided a privilege log, there is no way to know the extent of the materials being withheld by Nicor under a claim of privilege.

On June 17, 2003, CUB requested that Nicor provide written responses to its Data Requests, especially in light of the fact that Nicor had designated Scott Lassar as a witness in the hearing. See Exhibit C attached. Contrary to its previous on-the-record agreement to provide the materials to answer Set 11, Nicor now states that the 11th Set was "premature," that Mr. Lassar has the "right to claim attorney/client and/or work product privileges" and that no further answers would be provided until after Mr. Lassar

filed his testimony in these dockets. See response of John Rooney attached as Exhibit D. Nicor did not provide any privilege log or otherwise indicate what documents it was withholding or asserting a privilege.

The Data Requests in CUB's 11th Set are neither premature nor are they barred by any attorney/client and/or work product privilege that Mr. Lassar can claim. CUB is entitled to answers prior to Mr. Lassar's filing of testimony, especially in light of the ALJ's ruling that depositions of designated witnesses must occur before they file testimony.

As noted above, the answers to CUB's 11th Set of Data Requests are necessary for effective preparation for the depositions that are ongoing. For example, answers to 11.01, 11.09, 11.10, 11.11 and 11.12 would assist in the current depositions. Moreover, the lack of candor of Nicor in what it provided in February was underscored by the fact that Mr. Gilmore's deposition had to be stopped and rescheduled because his interview notes were not turned over by Nicor. Because Nicor has refused to provide a privilege log of what it is withholding, CUB and CCSAO have no way of knowing what other witness summaries or other important documents are being withheld under Nicor's mistaken and broad claim of privilege.

II. Argument.

A. Nicor has burden of proof to demonstrate privilege exists.

Nicor has the burden of proof to support its claim of attorney-client, attorney-work product privilege for the materials it is withholding. "One who claims to be exempt by reason of privilege from the general rule which compels all persons to disclose the truth has the burden of showing the facts which give rise to the privilege. His mere assertion that the matter is confidential and privileged will not suffice." *Cox v. Yellow*

Cab Company, 61 Ill.2d 416, 420,337 N.E.2d 15 (1975). The party who claims the privilege “has the burden of showing the facts which give rise to the privilege.” *Claxton v. Thackston*, 201 Ill. App.3d 232, 234, 559 N.E.2d 82 (First Dist. 6th Div. 1990). This is one reason why a party asserting the privilege is required to produce a log of materials it is withholding, something Nicor has failed to produce in this docket.

In order for Nicor to sustain its argument that there is an attorney-client or attorney-work product privilege, it must show:

?? There is an attorney-client relationship.

?? The statements were made in confidence that they would not be disclosed.

?? The statements were made within the control group of the company.

The first two criteria set out above apply generally to attorney-client, attorney-work product privilege and the third applies to Nicor because the alleged attorney-client, attorney-work product privilege is on behalf of a corporation.

B. Nicor Gas was not the client and statements were not given with expectation that they would not be disclosed.

In general, for there to be a privilege, Nicor must “show that the statement: (1) originated in a confidence that it would not be disclosed; (2) was made to an attorney acting in his legal capacity for the purpose of securing legal advice or services and (3) remained confidential.” *Claxton v. Thackston*, 201 Ill. App.3d at 235.

In its response of February 5, 2003, Nicor asserts that Mr. Lassar was not retained by Nicor Gas but rather by a special committee of Nicor, Inc.’s board of directors and they are “separate and distinct corporate entities.” Assuming for a moment the truth of Nicor Gas’s assertion that Mr. Lassar’s client is the Special Committee of the Board, his discussions with employees of Nicor Gas—which Nicor admits is separate and apart from

the party that retained Mr. Lassar—then no attorney-client privilege attaches to statements given to him by Nicor Gas employees.

Moreover, Mr. Lassar was not retained by the Special Committee as an attorney to give legal advice but rather “to conduct a *factual* investigation” and “to report on our *factual* findings and conclusions” to the committee. (Emphasis added.) Lassar Report at 1. His role as a fact gatherer, not an attorney giving legal advice, is underscored by the fact that Nicor Gas has designated Mr. Lassar as a witness in this case. Indeed, it would be a violation of the Rules of the Supreme Court for Mr. Lassar to give legal advice to Nicor. “A lawyer shall not accept or continue employment in contemplated or pending litigation if the lawyer knows or reasonably should know that the lawyer may be called as a witness on behalf of the client . . .” Ill. R. Prof. Conduct R. 3.7(a).

Nicor asserts the privilege under the Illinois Supreme Court rules, so in order to find a privilege at all, the ALJs must agree with Nicor that the Supreme Court rules apply. If that is so, then the cases decided by Illinois Courts can be used to determine the scope of the privilege.

The essentials required for an attorney-client privilege to exist has been defined by the Illinois Supreme Court as “(1) where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived.” *People v. Adam*, 51 Ill.2d 46, 280 N.E.2d 205, 207 (1972). None of these factors are present in the materials Nicor seeks to exclude from discovery.

C. Witnesses were expressly told that they were not Lassar's clients.

There was no legal advice sought by the persons interviewed by Mr. Lassar and his team. The Special Report in its introduction states that "Sidley Austin Brown & Wood ("Sidley") was hired by a Special Committee of the Board of Directors ("Special Committee") to conduct a factual investigation of certain allegations regarding the Performance Based Rate system ("PBR")." Thus, by its own statement, Nicor states that the Special Report and Mr. Lassar were not functioning to provide "legal advice" but rather to conduct a "factual investigation."

Moreover, in redacted notes of the interviews conducted by Mr. Lassar and his team, the following statement is constantly made to the Nicor Gas employees interviewed:

Scott [Lassar] began the interview by informing XXXX of the general nature of our investigation, and told [him/her] that we were not [his/her] lawyers, but instead were acting on behalf of the Special Committee. Scott asked that XXXXX not divulge what was discussed, but told [him/her] that there was a possibility that the Company might at some point in the future decide to make public what [he/she] had told us.

This statement by Mr. Lassar and his team to those interviewed is most revealing and undermines any argument of attorney-client privilege. As noted above, for an attorney-client relationship and the attendant privilege to exist, the communications must be made in confidence by the client and at the client's insistence are permanently protected from disclosure. Mr. Lassar told the persons interviewed that he was not their lawyer and that there was a possibility that the "Company" – not the Special Committee – might make the statements public. This shows that Mr. Lassar was not functioning as the interviewee's attorney and that the interviewee did not have the right to insist that the communications be protected from disclosure.

D. Statements to Lassar were given by persons not in Nicor's control group.

Not only did the Nicor employees not have an expectation that the materials would be confidential and that there was no attorney-client relationship, but Nicor also has not, and cannot, meet the control group test as required for a corporation to maintain an attorney-client privilege. The persons who were interviewed by Mr. Lassar were not in the control group for the client—which, according to Nicor is not Nicor but rather the Special Committee of the Board of Directors. In a corporate setting, not all communications between attorneys (assuming that Mr. Lassar was functioning in a legal, not fact finding role as publicly stated in the written report) and employees of the company can be designated as protected by the attorney-client privilege. The Illinois Supreme Court has adopted the “control group” test for determining whether the statements to an attorney are privileged. “To prevail on an attorney-client privilege claim in a corporate context, a claimant must first show that the statement was made by someone in the corporate control group.” *Hayes v. Burlington Northern and Santa Fe Ry. Company*, 323 Ill.App.3d 470, 474, 752 N.E.2d 470 (First Dist. 2nd Div. 2001). This test focuses on the status of the employee within the corporate hierarchy. If the employee making the communication “is in a position to control or even to take a substantial part in a decision about any action which the corporation may take upon the advice of the attorney, or if he is an authorized member of a body or group which has that authority, then, in effect, he is (or personifies) the corporation when he makes his disclosure to the lawyer and the privilege would apply.” *Consolidation Coal Company v. Bucyrus-Erie Co.*, 89 Ill.2d 103, 114; 432 N.E.2d 250 (1982).

So even if a communication meets the threshold criteria for a privileged communication, there is no privilege in Illinois if the communication is with a person outside the control group. In *Archer Daniels Midland Co. v. Koppers Co.*, 138 Ill. App. 3d 276, 485 N.E.2d 1301 (1985), the court followed *Consolidation Coal* and found that a report made to an in-house counsel was not covered by the attorney-client privilege.

In defining “control group,” *Consolidation Coal* refers to decision makers or those who “substantially influence” corporate decisions. The court, however, focused on individual people who substantially influenced decisions, not on facts that substantially influenced decisions. Here, Gordon supplied technical data and opinions to people within A.O. Smith who then decided what to do with that information. The decision to notify owners of A.O. Smith structures of potential dangers was not a decision in which Gordon participated except to provide technical data and his analysis of that data. His opinions were technical opinions in regard to the designs and manufacture of those structures, not opinions about the corporate policy. As an engineering expert, Gordon supplied information, technical recommendations, and opinions to employees, such as the corporate in-house counsel, whose legal opinions were sought and relied upon by others, such as A.O. Smith’s top management who ultimately made the decision to send notices to customers. Gordon, therefore, was not part of the control group as defined by *Consolidation Coal*. Thus, we hold that Gordon’s report is not privileged and must be made available for inspection.

485 N.E. 2d at 1303.

Nicor has not provided any evidence that the statements it seeks to withhold were made by persons in the control group. In fact, since Nicor insists that Mr. Lassar’s client is the Special Committee of the Board, no employee of either Nicor, Inc. or Nicor Gas could fall under the control group since Nicor Gas insists that the “client” is the Special Committee of the Board of Directors of Nicor, Inc.

Thus, Nicor’s unsupported statements that the attorney-client privilege exists are not supported by Nicor’s filings in these dockets.

E. Lassar's role is that of witness, not lawyer, in these dockets.

There have been two significant developments since CUB originally filed its Motion to Compel that makes the granting of this renewed motion more compelling than when it filed its original Motion.

First, Nicor has designated Mr. Lassar as a testifying witness whose testimony will cover his report to the Nicor Board. Second, the ALJs have ruled that depositions of testifying witnesses must be concluded before Nicor files its direct testimony.

By moving Mr. Lassar from an investigator to a witness, Nicor has waived any claim that any materials prepared or reviewed by him constitute "attorney work product" privilege. When work product is given to a testifying witness, it "either informs the expert as to what counsel believes are relevant facts, or seeks to influence him to render a favorable opinion. [citation omitted.] Thus, requiring disclosure of an attorney's communications to the expert does not impinge on the goals served by the opinion work product doctrine." *Karn v. Ingersol-Rand Co.*, 168 F.R.D. 633 (N.D. Ind. 1996). In *People v. Wagener*, 196 Ill.2d 269, 752 N.E.2d 430 (2001), the Illinois Supreme Court found that once a person who received confidential information was designated as an expert witness the attorney-client privilege "was waived in its entirety with respect to all information defendant had shared with the experts, just as it would be by the voluntary revelation of a privileged communication to any person with whom the privilege was not shared."

Further, the ALJs have required that the parties conduct depositions on witnesses that Nicor has identified prior to their filing testimony. By being denied access to the information sought in the 11th Set, CUB and CCSAO cannot adequately determine

whether to conduct Mr. Lassar's deposition at this time. Once Mr. Lassar's testimony is filed, the ALJs have indicated that depositions of testifying witnesses will not be permitted except under extreme circumstances.

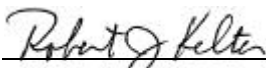
III. Conclusion.

As a result of these factors, CUB and CCSAO renews their Motion to Compel and requests that the ALJs enter an order on an expedited basis granting this Motion requiring:

1. That Nicor answer fully CUB's 11th Set of Data Requests and set a date for Nicor to comply sufficiently in advance of Nicor's date for prefilng testimony in order for CUB and CCSAO to review the responses and determine whether to seek Mr. Lassar's deposition.
2. Provide copies of all witness summaries that have been withheld by Nicor.
3. Require Nicor to produce a privilege log of each document that it is withholding, identifying the document and fully stating why it believes the document is privileged.
4. Provide unredacted copies of all witness summaries that have been previously furnished or will be furnished by Nicor.

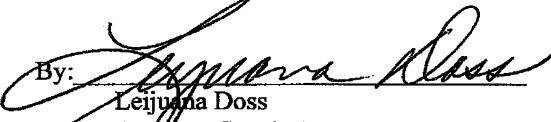
Respectfully Submitted,

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